

independent claim recites an “outflow” and further recites that the “outflow” comprises an “insect attractant.” In his rejection, it appears that the Examiner is interpreting the term “insect attractant” so unreasonably broadly as to encompass the heated outflow, as is the case in Cheshire. In Cheshire, however, no attractant is included in the outflow; instead the outflow is merely heated by the heat emanated from the light source used to attract insects.

Essentially the same issue was addressed by the Board of Appeals & Interferences in the parent application, namely U.S. Application 08/718,643. In that Appeal, the Board reversed the Examiner’s rejection based on Deyoreo (U.S. Patent No. 5,301,458) for its failure to disclose an insect attractant. In that Decision, a copy of which is enclosed for the Examiner’s convenience, the Board stated at page 5:

At the outset, it is important to appreciate that each of the applicant’s respective independent device and method claims 1, 11, 28, 31, 40 and 48 requires, inter alia, a flow of “an insect attractant.”

The primary reference relied upon by the examiner in each of the obviousness rejections on appeal is the Deyoreo patent. A reading of the Deyoreo patent makes it abundantly clear to us that the patentee’s focus (column 1, lines 6 through 19 and column 2, lines 32 through 40) was upon an insect killer or attracting device *which employs a light source* to attract insects. (underlining in original)

It is clear from this text that the Board did not consider the mere presence of light alone to constitute an “insect attractant” in the outflow. Instead, it is clear that the Board considered an “insect attractant” to be part of the outflow. In the present rejection, similarly to Deyoreo, Cheshire only discloses a light source for attracting the insects. Although Cheshire is somewhat more explicit in stating that the light source may add heat to its outflow for attracting insects, it still has the same basic structure as Deyoreo in regards to its provision for attracting insects. Specifically, they both use light sources. The Board clearly considered Deyoreo and concluded that the use of a light source did not meet the

limitation of an “insect attractant,” and that decision is binding on the Examiner. Ex parte Holt, 19 U.S.P.Q. 2d 1211, 1214, (Bd. Pat. App. & Interferences 1991), sets the standard for determining precedential effect of prior Board Decisions. With respect to unpublished Decisions, which is the case with the Decision rendered in the parent application, the Board stated:

Unless the facts in a succeeding case are “on all fours” with or substantially the same as the facts in the preceding appeal, generally, the opinion in the preceding unpublished appeal decision may not be controlling in a succeeding appeal. Of course, previously decided points of law must be followed unless overruled, and the application of the law to particular facts must be consistent from case to case. Id.

In the present case, the Examiner is bound to follow the Board’s ruling that all the independent claims positively recite an “insect attractant.” Further, the Examiner is bound by the application of this ruling to Deyoreo, which concludes that the use of a light source meet the claimed requirement of an “insect attractant” in the “outflow.” The issues of claim interpretation are the same, as the relevant claim language is essentially the same.¹ The application of this claim interpretation to the disclosure of Cheshire is the “on all fours” with the application of this interpretation to Deyoreo, as they both have the same basic disclosure of a light source for attracting insects. Accordingly, the Examiner is requested to withdraw the anticipation rejection against the independent claims based on Cheshire and allow all the independent claims.

The remaining claims are dependent and are submitted to distinguish from the art of record for at least the reasons advanced above with respect to independent claims, and for the additional reason that they each recite additionally patentable features. The


¹ For example, claim 11 of the parent application on appeal recited “a gaseous first flow which includes an insect attractant,” and claims 20 and 31 on appeal recited that “the first flow includ[es] an insect attractant.” This language is essentially the same as an “outflow comprising an insect attractant,” which is recited by each independent claim of the present application.

Applicants note the obviousness rejections made against the dependent claims based on Cheshire alone and Cheshire and Waters. These rejections are obviated by the overcoming the rejections to the independent claims above.

All objections and rejections having been addressed, it is respectfully submitted that the present application is in a condition for allowance and a Notice to that effect is earnestly requested.

If the Examiner has any questions concerning this response, or the application in general, he is encouraged to contact the undersigned at the below-listed phone number to help facilitate prosecution of this application.

Respectfully submitted,

By: 
Bryan P. Collins
Reg. No.: 43,560
Tel. No.: (703) 905-2038
Fax No.: (703) 905-2500

BPC/ml
P.O. Box 10500
McLean, VA 22102
(703) 905-2000